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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

DONALD E. PERCY, et al.,

Petitioners,

v.

CAMEO CONVALESCENT CENTER, INC.,
DRAGOMIR KRESOVIC,
BORISLAV KRESOVIC,
LINDA HINTZ,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SEVEN CIRCUIT

PETITION FOR WRIT OF CERTIORARI
WITH APPENDIX (Pp. 1-54)

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No. _____

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SUPREME COURT OF THE UNITED STATES

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QUESTIONS PRESENTED FOR REVIEW

1. Was denial to counties of the right to refer patients to the nursing home, without granting the nursing home the state-required prior hearing, a

deprivation without due process of law where there were adequate state remedies?

2. Was the trial court's failure to give a consipracy instruction harmless error in light of the jury findings of no deprivation by any actor?

3. Did fourteenth amendment due process entitle the corporate nursing home to a full adversary hearing, prior to denying counties the right to refer patients to the nursing home, where such denial did not otherwise prevent the nursing home from conducting its business and where notice and opportunity to be heard preceded the denial?

PARTIES TO THE PROCEEDINGS

Petitioners were officials and employes of the State of Wisconsin

Department of Health and Social Services. They are Donald Percy, Secretary of the Department and its chief executive officer; Robert Durkin, Administrator of the Department's Division of Health; Charles J. Fiss, Jr., Peggy Ann Smelser, Louis E. Remily, and Milton J. Stearns, managers in the Division's Bureau of Quality Compliance; David L. Siegel and Thomas G. Van de Grift, enforcement attorneys of the Department working in the Bureau; Darla C. Senn, Nancy Kacynski, Kathleen Rubin, and Janet Zanck, surveyors in the Bureau; and Fran Richards, supervisor of the surveyors.

Respondents are listed in the caption.

TABLE OF CONTENTS AND
TABLE OF AUTHORITES

QUESTIONS PRESENTED FOR REVIEW.....1

PARTIES TO THE PROCEEDINGS.....2

REPORTS OF DECISIONS UNDER REVIEW.....9

JURISDICTION.....9

RELEVANT STATUTORY PROVISIONS.....10

STATEMENT OF THE CASE.....10

ARGUMENT.....20

I. Denial To Counties Of The Right To Refer Patients To The Nursing Home, Without Granting The Nursing Home The State-Required Prior Hearing, Was Not A Deprivation Without Due Process Of Law Where There Were Adequate State Remedies....20

II. The Trial Court's Failure To Give A Conspiracy Instruction Was Harmless Error In Light Of The Jury Findings Of No Deprivation By Any Petitioner.....25

III. Fourteenth Amendment Due Process Did Not Entitle The Corporate Nursing Home To A Full Adversary Hearing, Prior To Denying Counties The Right To Refer Patients To The Nursing Home, Where Such Denial Did Not Otherwise Prevent The Nursing Home From Conducting Its Business And Where Notice And Opportunity To Be Heard Preceded The Denial.....32

CONCLUSION.....38

CASES CITED

Air East, Inc. v. National Transportation Safety Board,
512 F.2d 1227 (3rd Cir. 1975)...36

Birnbaum v. Trussell,
371 F.2d 672
(2nd Cir. 1966).....27

Cameo Convalescent Center, Inc. v. Senn,
738 F.2d 836 (7th Cir. 1984).....9

Davis v. Scherer,
104 S. Ct. 3012 (1984).....33

Dennis v. Sparks,
449 U.S. 24 (1980).....28

Fahey v. Mallonee,
332 U.S. 245 (1947).....36

Hanna v. Home Ins. Co.,
281 F.2d 298 (5th Cir. 1960), cert. denied, 365 U.S. 838 (1961).....27

Hodel v. Virginia Surface Min. & Reclam. Ass'n.,
452 U.S. 264 (1981).....36

Hoffman v. Halden,
268 F.2d 280 (9th Cir. 1959)....27

Hostrop v. Bd. of Jr. College Dist., No. 515,
523 F.2d 569 (7th Cir. 1975)....28

Hudson v. Palmer,
104 S. Ct. 3194
(1984).....21, 22, 24

Ibrahim v. Samore,
118 Wis. 2d 720,
348 N.W.2d 554 (1984).....25

Ingraham v. Wright,
430 U.S. 651 (1977).....22

Lewis v. Brautigam,
227 F.2d 124
(5th Cir. 1955).....27

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1982).....23

Mathews v. Eldridge,
424 U.S. 319 (1976).....34, 38

Monell v. Department of Social Services,
436 U.S. 658 (1978).....26

Nesmith v. Alford,
318 F.2d 110 (5th Cir. 1963), cert. denied 375 U.S. 975 (1964),.....27

Northwestern Nat. Life Ins. Co. v. Riggs,
203 U.S. 243 (1906).....34

Olim v. Wakinekona,
103 S. Ct. 1741 (1983).....33

Parratt v. Taylor,
451 U.S. 527 (1981).....21

Paul v. Davis,
424 U.S. 693 (1976).....33

Phillips v. Trello,
502 F.2d 1000 (3rd Cir. 1974)...27

Rizzo v. Goode,
423 U.S. 362 (1976).....26

Shango v. Jurich,
681 F.2d 1091 (7th Cir. 1982)...33

Western Turf Asso. v. Greenberg,
204 U.S. 359 (1907).....34

Wisconsin v. Constantineau,
400 U.S. 433 (1971).....33, 37

WISCONSIN STATUTES

Sec. 50.03(11),
Wis. Stats. (1977).....24, 37

Sec. 50.04(4)(3),
Wis. Stats. (1977).....24

Sec. 50.04(4)(c)2,
Wis. Stats. (1977).....37

Sec. 50.04(4)(d),
Wis. Stats. (1977).....16, 23, 32

Sec. 50.04(4)(d)2,
Wis. Stats. (1977).....35

Sec. 50.04(4)(e),
Wis. Stats. (1977).....37

OTHER AUTHORITIES

28 U.S.C. sec. 1254(1).....9

28 U.S.C. sec. 1291.....12

28 U.S.C. sec. 1343(3).....11

42 U.S.C. sec. 1983.....10,11,12, 20,
.....26, 27, 29, 33

REPORTS OF DECISIONS UNDER REVIEW

The decision of the Court of Appeals is reported as Cameo Convalescent Center, Inc. v. Senn, 738 F.2d 836 (7th Cir. 1984), and set forth in the appendix ("A") at 3-51. Other record items have been lodged with the Court and are indicated by an "L."

JURISDICTION

The Court of Appeals' decision was made on June 29, 1984. Judgment was made and entered on the same date (A. at 1-2.) Respondents' petition for rehearing was denied on July 30, 1984 (A. at 52-54.)

This court has jurisdiction under 28 U.S.C. sec. 1254(1).

RELEVANT STATUTORY PROVISIONS

Title 42 U.S.C. sec. 1983:

> Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Respondents are a corporate for-profit nursing home, their

adminstrators and director of nursing. They commenced this action in December 1979 under 42 U.S.C. sec. 1983. The district court had jurisdiction under 28 U.S.C. sec. 1343(3). Pendent state claims were dismissed on February 8, 1982.

Trial to a jury was held in September and October 1982. The jury found petitioner Senn had engaged in a malicious prosecution and abuse of process against the corporate respondent. No other petitioner was found to have committed a wrong (A. 55-70). On October 8, 1982, the district court entered judgment dismissing all other petitioners, dismissing all respondents except the corporate nursing home, and awarding $65,000

compensatory and $10,000 punitive damages in favor of the corporate nursing home against petitioner Senn.

The Court of Appeals had jurisdiction under 28 U.S.C. sec. 1291. It affirmed in part, reversed in part, and remanded for a new trial. It affirmed the dismissal of the noncorporate respondents. (A. 40-42.) It reversed the judgment against Senn on the ground that a malicious prosecution and abuse of process are not actionable under 42 U.S.C. sec. 1983 absent an accompanying deprivation of a property or liberty interest. (A. 44-47.) It reversed the judgment in favor of the remaining petitioners on the ground that the trial court erred

in failing to give a conspiracy instruction, and ordered a new trial. (A. 18-30.)

The factual setting for the case begins in September of 1978. Petitioner Senn, a nurse surveyor for the State of Wisconsin Department of Health and Social Services, after conducting an on-site inspection, issued thirty-one notices of violation (NOVs) of Wisconsin nursing home law against respondent Cameo Convalescent Center, Inc. Petitioner Kacynski issued three NOVs against Cameo. Petitioners Rubin and Zanck issued NOVs against Cameo about a year later. Petitioners Van de Grift

and Siegel were Department attorneys who prepared and presented evidence in administrative hearings regarding the NOVs. The remaining petitioners were supervisors, managers, and others in the Department who had varying degrees of knowledge and involvement with the administrative case against Cameo. The administrative case was eventually settled.

Senn's September survey was an on-site inspection of the nursing home. At its conclusion, she met with nursing home representatives, who had brought their attorney to attend, to discuss her findings of violations. The following January, two other state inspectors made an on-site inspection to determine

whether the NOVs had been corrected. They found that all but seven of the NOVs had been corrected. Cameo representatives were part and parcel of the investigatory process, and several meetings were held with Department and Cameo representatives. (A. at 7-11, 46-47, 79-85, 100-03; L at 7-9.)

One of the statutory enforcement tools the Department was directed to use was the suspension of referrals list (SORL). If a nursing home was placed on the list, county social services agencies were forbidden to refer patients to it. Eligibility for the SORL was determined by the number of NOVs outstanding. Even if eligible for placement on the

SORL, however, a nursing home could not be placed on the list if it filed a timely appeal. Wis. Stats. (1977) sec. 50.04(4)(d) (A. at 112-14.)

In March 1979 petitioner Fiss advised Cameo that, because of the outstanding NOVs during the Senn survey which remained uncorrected after the second January 1979 on-site examination by two other investigators, Cameo would be placed on the SORL unless it timely exercised its appeal rights. (L at 1-3.)

Cameo did appeal, although not in the manner prescribed by Fiss' notice, and was given the benefit of doubt as to timeliness. (A. at 86-96.) At trial there was evidence tending to show that,

because of Cameo's departure from the prescribed procedure, its notice of appeal was mislaid until about April 12, 1979. (A. at 71-76, 86, 91-94.) In the meantime, Cameo's name was placed on the SORL dated April 4, 1979. (L. 4-6.) When the error was caught on April 12, a retraction and apology were issued the next day. (A. at 104-06.)

As to the surveyors who issued NOVs, the jury found that only petitioner Senn, and no other, prepared and prosecuted NOVs without probable cause; that she acted with malice in doing so; that she did so with an ulterior or improper motive; that she acted in a manner not authorized by the administrative process; and that

she did not enjoy prosecutorial or good faith immunity therefor. As to all petitioners, including Senn, the jury found that none of them committed any act in retaliation for Cameo's exercise of its rights to free speech or to petition the government for redress of grievances; that none of them were personally and directly responsible for placement of Cameo on the SORL and acted with intentional or reckless disregard of Cameo's appeal rights; and that none of them intentionally or recklessly denied a timely hearing on the NOVs and the imposition of a plan of correction. (A. 55-70.)

In reversing the judgment against Senn, the Court of Appeals held that neither a malicious

prosecution nor an abuse of process was actionable unless it resulted in a deprivation of a property or liberty interest. (A. 44-45.) It agreed with the district court that Senn's involvement had no connection with Cameo's placement on the SORL, the only conceivable "deprivation." (A. 45-47.)

In reversing the judgment in favor of the remaining petitioners, the Court of Appeals held that the district court should have given Cameo's proferred jury instruction on conspiracy. (A. 18-30.) Further, even though the jury found no petitioner had acted with intentional or reckless disregard of Cameo's appeal rights with respect to placement on the SORL, the Court of Appeals found error in

the instructions in that "recklessly" was defined within the definition of "intent." (A. at 35-36.) It found additional error in the trial court's failure to instruct the jury that Cameo had a due process right to a hearing prior to being placed on the SORL. (A. at 30-35.)

ARGUMENT

I. Denial To Counties Of The Right To Refer Patients To The Nursing Home, Without Granting The Nursing Home The State-Required Prior Hearing, Was Not A Deprivation Without Due Process Of Law Where There Were Adequate State Remedies.

The Court of Appeals held that Cameo had an actionable claim under 42 U.S.C. sec. 1983 because individual

State officials forbade counties from referring patients to Cameo without a prior hearing, even though state law required a prior hearing. By so holding, the Court of Appeals' decision directly conflicts with the rule of Hudson v. Palmer, 104 S. Ct. 3194 (1984), which was decided after the decision under review.

Hudson v. Palmer extended the rule of Parratt v. Taylor, 451 U.S. 527 (1981), to intentional deprivations. Parratt v. Taylor had held that the fourteenth amendment is not violated when a state employe negligently deprives an individual of property, provided that the State makes available a meaningful postdeprivation remedy. Hudson v. Palmer extended the rationale to intentional deprivations, "[f]or intentional, as for negligent

deprivations of property by state employees, the State's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy." Hudson v. Palmer, 104 S. Ct. at 3204 (footnote omitted).

Hudson v. Palmer is not limited to property deprivations. It includes liberty deprivations as well. This Court noted that its holding was "foreshadowed" by Ingraham v. Wright, 430 U.S. 651 (1977), a liberty interest case which this Court held was not actionable because of the availability of state remedies. Hudson v. Palmer, 104 S. Ct. at 3204 n. 14.

Consequently, it makes no difference whether Cameo was deprived of property or liberty. Neither deprivation is actionable if the State provided meaningful postdeprivation remedies.

Nor does it make a difference if, as Cameo alleges, the petitioners conspiratorially denied it a hearing before placing it on the suspension of referrals list. Wisconsin law required a prior hearing. Wis. Stats. (1977) sec. 50.04(4)(d). (A. at 112-13.) Petitioners' conduct, as alleged by Cameo, was random and unauthorized, contrary to the established state procedures. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 435-36 (1982). The State action was not complete until and unless it provided or

refused to provide a suitable postdeprivation remedy. Hudson v. Palmer, 104 S. Ct. at 3204.

Wisconsin provided suitable postdeprivation remedies. First, administratively Cameo could ask for a hearing to "contest any department action" and obtain judicial review after hearing. Interim injunctive relief was available. Wis. Stats. (1977) secs. 50.03(11) and 50.04(4)(e). (A. at 107-08, 114-15.) In point of fact, the Department corrected the SORL error without request from Cameo. Petitioner Fiss instantly issued an apology and retraction to remove Cameo from the list (A. at 104-06), and it happened so fast Cameo knew of the apology and retraction before it knew of its placement on the list. (A. at 77.)

Second, sovereign immunity is no bar to damage suits against individual state officers. Officials can be sued individually either for the negligent performance of a ministerial duty or for conduct that is malicious, willful, and intentional. Ibrahim v. Samore, 118 Wis. 2d 720, 348 N.W.2d 554, 558 (1984).

II. The Trial Court's Failure To Give A Conspiracy Instruction Was Harmless Error In Light Of The Jury Findings Of No Deprivation By Any Petitioner.

The Court of Appeals required a conspiracy instruction despite the jury's finding that no petitioner did any act of retaliation or otherwise wrongfully caused Cameo to be placed on the SORL.

It is basic to sec. 1983 law that liability is direct and personal, not vicarious. Monell v. Department of Social Services, 436 U.S. 658, 694 (1978); Rizzo v. Goode, 423 U.S. 362, 376 (1976). Under 42 U.S.C. sec. 1983, by its own terms, a person is liable to another if he or she "subjects, or causes [the other] to be subjected" to a deprivation. Conspiracy law, as a tool to impose liability for the act of another, clashes with the requirement of direct and personal responsibility for subjecting the other to a deprivation. In no event can a conspiracy to injure upset a verdict that no actor caused injury.

The circuits are not in entire harmony as to the role a conspiracy may

play in a sec. 1983 action. Two circuits suggest that the conspiracy itself is actionable. See Phillips v. Trello, 502 F.2d 1000, 1004 (3rd Cir. 1974), and Birnbaum v. Trussell, 371 F.2d 672, 676 (2nd Cir. 1966). Two other circuits, however, hold that conspiracy itself is not actionable but that, if the conspiracy proximately causes a deprivation resulting in actual damages, it may serve to impose liability on the participants, even those who did not perform the damaging act. See Hoffman v. Halden, 268 F.2d 280, 294 (9th Cir. 1959); Nesmith v. Alford, 318 F.2d 110, 859 (5th Cir. 1963), cert. denied, 375 U.S. 975 (1964); Hanna v. Home Ins. Co., 281 F.2d 298, 303 (5th Cir. 1960), cert. denied, 365 U.S. 838 (1961); Lewis v. Brautigam, 227 F.2d 124, 128 (5th Cir. 1955). The

Seventh Circuit specifically aligned itself with the Fifth Circuit view, holding that "it is the acts causing damage to the plaintiff that give rise to liability for damages, not the conspiracy itself." Hostrop v. Bd. of Jr. College Dist., No. 515, 523 F.2d 569, 576 (7th Cir. 1975).

Moreover, this Court effectively has adopted the rule in the fifth, seventh, and ninth circuits. In Dennis v. Sparks, 449 U.S. 24, 27-28 (1980), in upholding a conspiracy allegation involving a state judge and a private party, this Court noted that the judge's official act "was the product" of the conspiracy.

Thus, this Court should grant certiorari to review this question for two reasons. First, the Court of Appeals neglected to follow its own as

well as this Court's rule that a conspiracy without an otherwise actionable wrong has no role in a sec. 1983 action. Second, there is conflict between the circuits as to the precise role conspiracy plays in a sec. 1983 action, with the second and third circuits saying it is independently actionable and the fifth, seventh, and ninth circuits saying it only imposes liability on participants to actions that result in a deprivation.

Had the Court of Appeals applied its own and this Court's rule correctly, the district court's failure to give the conspiracy instruction was harmless. For no petitioner subjected Cameo to any legal injury. The jury found that no petitioner acted to retaliate for first

amendment activity; that no petitioner was personally and directly responsible for placement of Cameo on the SORL and acted with intentional or reckless disregard of its appeal rights; and that no petitioner denied a timely hearing on the NOVs or the plan of correction. Further, except as to petitioner Senn, the jury found that no petitioner prepared and prosecuted an NOV without probable cause; that no petitioner acted with malice or with an ulterior or improper motive in doing so; and that no petitioner acted in a manner not authorized by the administrative process. (A. at 55-70.) And as to Senn, the jury, the district court, and the Court of Appeals (A. 45-47) agreed that nothing she did proximately caused Cameo's placement on the SORL.

Should this Court grant review on this question, a subissue is the Court of Appeals' holding that the trial court did not correctly instruct the jury on reckless disregard in respect to placement on the SORL. Since the jury found that no petitioner acted to retaliate and that no petitioner (except for Senn) departed from authorized administrative procedure, both the reckless disregard and conspiracy issues are red-herrings. (So does the exception for Senn since she had no causal relationship to the SORL error.) In any event, the importance of resolving the conspiracy question should not deter disposing of the reckless disregard subissue.

Consequently, the absence of a personal involvement in conduct resulting in a deprivation makes harmless any error in failing to give the conspiracy instruction.

III. Fourteenth Amendment Due Process Did Not Entitle The Corporate Nursing Home To A Full Adversary Hearing, Prior To Denying Counties The Right To Refer Patients To The Nursing Home, Where Such Denial Did Not Otherwise Prevent The Nursing Home From Conducting Its Business And Where Notice And Opportunity To Be Heard Preceded The Denial.

State law imposed a prior, full adversary hearing requirement for placement on the SORL upon receipt of a timely appeal. Wis. Stats. (1977) sec. 50.04(4)(d). (A. 113.) But the fact that a state's own procedural rules are

violated is not convertible into a due process claim actionable under 42 U.S.C. sec. 1983. Olim v. Wakinekona, 103 S. Ct. 1741, 1748 (1983); Shango v. Jurich, 681 F.2d 1091, 1100-01 (7th Cir. 1982). Accord, Davis v. Scherer, 104 S. Ct. 3012, 3020 (1984) (defense of qualified immunity not lost for failure to follow state rules).

The Court of Appeals, apparently recognizing that state law hearing requirements could not generate a due process hearing requirement, relied on Wisconsin v. Constantineau, 400 U.S. 433 (1971), and Paul v. Davis, 424 U.S. 693 (1976), to conclude that placement on the SORL injured Cameo's reputation and served to alter its legal status by forbidding county referrals. (A. at 30-32.)

If the Court of Appeals meant that a corporation has a liberty interest protectible by due process, it acted directly contrary to the holdings of this Court. Western Turf Asso. v. Greenberg, 204 U.S. 359, 363 (1907); Northwestern Nat. Life Ins. Co. v. Riggs, 203 U.S. 243, 255 (1906).

Further, if it meant to say that placement on the SORL affected some other corporate interests protected from deprivation without due process, the Court of Appeals wholly failed to analyze the competing interests as required by Mathews v. Eldridge, 424 U.S. 319 (1976), to determine whether a predepivation hearing was required and whether the notice and opportunity here were sufficient. Those relevant factors

are the private interest involved, the risk of an erroneous deprivation, and the government's interest.

Application of these criteria here would show that Wisconsin's provision for a prior, full adversary hearing for placement on the SORL is gratuitous, not constitutionally required. Placement on the SORL did not require Cameo to cease doing business: it only forbade county agencies from making referrals. Wis. Stats. (1977) sec. 50.04(4)(d)2. (A. 113.) Thus, the private interest affected was minimal. Second, the risk of erroneous deprivation is minimal because the NOVs and the follow-up verification vist were on-site inspections by three different inspectors at two different times. (A. at 7-11, 46-47, 79-85, 100-03; L. at 7-9.) Third, the government's

interest was the protection of the life and safety of aged and infirm nursing home residents of a private for-profit corporation. Such interests justify swift action without prior hearing. Cf. Hodel v. Virginia Surface Min. & Reclam. Ass'n., 452 U.S. 264, 298-300 (1981) (mining); Fahey v. Mallonee, 332 U.S. 245, 253-54 (1947) (savings and loan); and Air East, Inc. v. National Transportation Safety Board, 512 F.2d 1227, 1231-32 (3rd Cir. 1975) (air transportation). Cameo was eligible for placement on the SORL because it had five or more violations, some of which were "class B" violations. (L. at 1-3.) Those violations are defined as creating a condition or occurrence "directly threatening to the health,

safety or welfare of a resident." Wis. Stats. (1977) sec. 50.04(4)(c)2. (A. at 111-12.)

Moreover, the Court of Appeals neglected to consider the availability of postdeprivation administrative proceedings and judicial review. Wis. Stats. (1977) secs. 50.03(11) and 50.04(4)(e). (A. at 107-08, 114-15.) Instead, it relied on Wisconsin v. Constantineau, which involved the total absence of a state remedial mechanism.

Finally, the Court of Appeals failed to consider the sufficiency of the prior process that was provided. It consisted in the original on-site inspection by Senn, the subsequent on-site inspection by two other surveyors, the involvement of Cameo at all stages, Cameo's inclusion of an attorney in the initial exit interview, and the numerous

meetings between the Department and Cameo prior to placement. (A. at 7-11, 46-47, 79-85, 100-03; L. at 7-9.) This Court's rule is that ordinarily something less than a full evidentiary hearing suffices to warrant administrative action. Mathews v. Eldridge, 429 U.S. 319, 343 (1976). The Court of Appeals gave no justification for departing from this norm.

These departures from established rulings of this Court warrant review.

CONCLUSION

Petitioners respectfully pray that the Court issue its writ of certiorari

to the Court of Appeals for the Seventh Circuit.

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Appendix

TABLE OF CONTENTS

Judgment, United States Court of Appeals for the Seventh Circuit, June 29, 1984.....1

Opinion, United States Court of Appeals for the Seventh Circuit, June 29, 1984.....3

Order on rehearing, United States Court of Appeals for the Seventh Circuit, June 30, 1984.....52

Special Verdict, United States District Court for the Western District of Wisconsin, September 23, 1982.....55

Trial Testimony of Nadene Dreher, September 16, 1982.....71

Trial Testimony of Borislav Kresovic, September 14, 1982.....77

Trial Testimony of Jane Preston, September 16, 1982.....78

Trial Testimony of Thomas Van de Grift, September 17, 1982.....86

Trial Testimony of Dragomir Kresovic, September 15, 1982.....100

Letter of April 13, 1979,
Charles J. Fiss, Jr. to
All County Service Agencies,
51.42 and 51.437 Boards and
other interested parties.....104

Letter of April 13, 1979,
Charles J. Fiss, Jr.
to Dragomir Kresovic.....105

Sections 50.03(11)(a) and (b);
50.04(3) and (4), Wis. Stats.
(1977).....107

Opinion by Judge Grant

JUDGMENT - ORAL ARGUMENT

For the Seventh Circuit

Chicago, Illinois 60604

June 29, 1984

Before

Hon. WALTER J. CUMMINGS, Chief Judge

Hon. HARLINGTON WOOD, JR.,
Circuit Judge

Hon. ROBERT A. GRANT,
Senior District Judge*

(Formal parts omitted.)

This cause was heard on the record from the United States District Court

for the Western District of Wisconsin, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED in part, REVERSED and REMANDED in part, in accordance with the opinion of this Court filed this date. Each party is to bear its own costs on appeal.

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* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

BEST AVAILABLE COPY

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 83-1034
CAMEO CONVALESCENT CENTER, INC., et al.,

Plaintiffs-Appellees,

v.

DARLA C. SENN,

Defendant-Appellant.

No. 83-1048
CAMEO CONVALESCENT CENTER, INC., DRAGOMIR KRESOVIC, BORISLAV KRESOVIC, LINDA HINTZ,

Plaintiffs-Appellants,

v.

DONALD E. PERCY, et al.,

Defendants-Appellees.

(Caption continued
on following page)

No. 83-1545
CAMEO CONVALESCENT CENTER, INC.,

Plaintiff-Appellant,

v.

DARLA C. SENN, et al.,

Defendants-Appellees.

No. 83-1672
CAMEO CONVALESCENT CENTER, INC., et al.,

Plaintiffs-Appellees,

v.

DARLA C. SENN,

Defendant-Appellant.

Appeals from the United States
District Court for the Western
District of Wisconsin
No. 79-C-570
John C. Shabaz, Judge.

ARGUED NOVEMBER 28, 1983-DECIDED
JUNE 29, 1984

Before Cummings, Chief Judge, Wood, Circuit Judge, and Grant, Senior District Judge.*

Grant, Senior District Judge. Plaintiff-Appellants, Cameo Convalescent Center, Inc. (Cameo), and three of its officers and directors brought this action under 42 U.S.C. § 1983 alleging that the defendants, officers and employees of the Wisconsin Department of Health and Human Services (WDHHS), acted individually and in concert

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* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

to deprive the plaintiffs of constitutionally protected rights. For the reasons explained below, we affirm in part and reverse and remand in part for further proceedings consistent with this opinion.

Facts

Cameo Convalescent Center, Inc. (Cameo) is a closely held corporation in Milwaukee, Wisconsin, whose primary business is operating a licensed nursing home. Nursing homes are subject to extensive federal and state

regulation and in Wisconsin, the Wisconsin Department of Health and Human Services monitors the compliance of nursing homes with these federal and state regulations. This action arose by virtue of certain enforcement actions taken by the WDHHS.

On September 19, 1978, Darla Senn, a nurse-surveyor and employee of the WDHHS, served thirty-four notices of

violation (NOV) upon Cameo.[1] Thirty-one of the NOVs alleged deficiencies in Cameo's nursing program and three alleged deficiencies in Cameo's social services program. On October 17, 1978,

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[1] A notice of violation is a legal notice informing the nursing home that it is in violation of WDHHS regulations:

> (4) NOTICE OF VIOLATION; CORRECTION. (a) Notice of Violation; 1. If upon inspection or investigation the department determines that a nursing home is in violation of this subchapter or the rules promulgated thereunder, it shall promptly serve a notice of violation upon the licensee. Each notice of violation shall be prepared in writing and shall specify the nature of the violation, and the statutory provision or rule alleged to have been violated. The notice shall inform the licensee of the right to a hearing under par. (e)....

Wis. Stats. Ann. §50.04 (Supp. 1983).

the WDHHS imposed a plan of correction upon Cameo requiring that all the deficiencies noted by Senn be corrected within a day.[2] Despite a timely appeal of the NOVs and the plans of correction,

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[2] Upon the issuance of a NOV, the department would request a plan of correction from the nursing home explaining how the nursing home intended to remedy the deficiency. Upon Cameo's failure to submit plans of correction, the WDHHS imposed plans of correction upon Cameo. Ultimately, the WDHHS gave Cameo more time within which to comply with the plans of correction. See Wis. Stat. Ann. § 50.04(4)(c)(2) (Supp. 1983).

Cameo never received a hearing within the thirty-day period required under Wisconsin law.[3]

On October 26, 1978, Kacynski, a nurse-surveyor who had been with Senn when the thirty-four notices of violation were issued, and who was responsible for the issuance of the three social services NOVs, conducted a verification visit to determine if Cameo had complied with the plans of correction. Kacynski found that all three violations in the social services area had been corrected. On

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[3] Id. § 50.04(4)(e).

January 2, 1979, another verification visit was conducted. Of the thirty-one violations alleged by Senn, twenty-four were found to have been corrected, acceptable progress was found to have been made with respect to four, and only three remained uncorrected.

Cameo strongly opposed the issuance of the NOVs contending that they were without merit. Cameo suggested that the NOVs had been issued in retaliation for comments Cameo had made to Wisconsin government representatives concerning what Cameo alleged to be the poor quality and biased nature of the annual nursing home surveys which the WDHHS conducted. At trial, Cameo proffered evidence that Senn, shortly after issuing the 34 NOVs, told another nurse-surveyor "You know, I intend to screw them [Cameo]." Other evidence which

Cameo produced at trial showed that the WDHHS became increasingly aware that many of the NOVs issued by Senn were meritless, but the WDHHS continued to pursue them nonetheless.

On March 21, 1979, Cameo was notified that it was being placed on the WDHHS' Suspension of Referrals list.[4] The Suspension of Referrals list (SOR list) is compiled by the WDHHS and consists of nursing homes with a

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[4] Id. § 50.04(4)(d).

certain number of uncorrected violations.[5] The legal effect of

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[5] (d) Suspension of referrals. 1. The department shall prepare on a monthly basis a list containing the names and addresses of all nursing homes with existing class "A" violations as defined in par. (b) 1 or with 5 or more existing violations of any type, for which a plan of correction has not been timely submitted to the department under par. (c), for which a plan of correction has been disapproved or for which an approved plan of correction has not been carried out. A copy of the monthly list of violators shall be sent to each county welfare director and each s. 51.42 or 51.437 board director in the county in which each nursing home listed is located. The department shall notify each nursing home placed on the list of such placement at least 10 days prior to the issuance of the list. No nursing home may be placed on the list unless a hearing has been held under par. (e) and a final determination has been made by the department or the time for requesting a hearing has passed and no request has been made. A nursing home shall be removed from the list when all corrections are made or when a plan of correction for all deficiencies is approved by the department. The list shall indicate those nursing homes which have been removed from the list during the prior month.

placement upon the SOR list is to preclude state social service agencies and departments from referring nursing home patients to homes on the SOR list.[6] Wisconsin law provides that no nursing home may be placed on the SOR list unless it has been afforded the

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[6] Id. § 50.04(4)(d)(2).

opportunity for a hearing prior to its placement on the list.[7] Despite a timely appeal by Cameo, no hearing was ever held. Cameo's name appeared upon the April SOR list which was forwarded to over 600 social service departments and agencies.

Ultimately, the NOVs issued by Senn were the subject of a stipulated settlement between Cameo and the WDHHS. Plaintiffs filed the present action alleging that as a result of defendants' action, they suffered substantial and direct economic losses, loss of business reputation and deprivations of their constitutional rights under the first, ninth and fourteenth amendments of the Constitution. A bifurcated trial was

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[7] Id. § 50.04(4)(d).

held. Prior to the end of the liability phase of the trial, the district court dismissed the individual plaintiffs. At the conclusion of the liability phase of the trial, the jury found that nurse-surveyor Darla Senn had acted with malice in preparing and prosecuting the NOVs against Cameo, and that the NOVs were prepared and prosecuted against Cameo for ulterior or improper motives. No other defendant was found liable. The jury awarded Cameo compensatory damages of $65,000 and punitive damages of $10,000. Both Cameo and Senn appeal.

Cameo raises four issues on appeal:

I. Whether the district court erred in declining to present plaintiffs' conspiracy theory to the jury;

II. Whether the district court's due process instructions were erroneous;

III. Whether the district court erred in certain evidentiary rulings and in refusing to give a missing witness instruction;

IV. Whether the district court erred in dismissing the claims of the individual plaintiffs?

Darla Senn raises two issues for our consideration:

I. Whether the district court erred in entering a judgment of liability against Darla Senn based upon the special jury verdict;

II. Whether Darla Senn is entitled to absolute immunity under Butz v. Economou, 438 U.S. 478 (1978)?

I. Whether the district court erred in declining to present plaintiffs' conspiracy theory to the jury?

The main thrust of plaintiffs' case was that the defendants had acted in concert to deprive the plaintiffs of constitutionally protected rights. At trial, however, no conspiracy instruction or special verdict question on conspiracy was presented to the jury. Instead, the instructions focused on individual liability. Cameo contends that it was reversible error for the district court not to have instructed the jury on its conspiracy claim.

Where supported by sufficient evidence, a plaintiff is entitled to have the jury instructed by the Court on

the theory of his case. Hallberg v. Brasher, 679 F.2d 751, 757 (8th Cir. 1982); Alloy International Co. v. Hoover-NSK Bearing Company, Inc., 635 F.2d 1222, 1226 (7th Cir. 1980); Brandes v. Burbank, 613 F.2d 658, 668 (7th Cir. 1980); Don Burton, Inc. v. Aetna Life and Casualty Co., 575 F.2d 702, 706 (9th Cir. 1978) ("[A] litigant is entitled to have the jury charged concerning his theory of the case if there is any direct or circumstantial evidence to support it.") Indeed, the failure to give an instruction, where merited, effectively directs a verdict for the opposing party on the disputed issue. Id.

Where the issue of civil conspiracy is involved, courts must be particularly cautious. As this Court noted in Hampton v. Hanrahan:

> [T]he question whether an agreement exists should not be taken from the jury in a civil conspiracy case so long as there is a possibility that the jury can 'infer from the circumstances [that the alleged conspirators] had a meeting of the minds and thus reached an understanding' to achieve the conspiracy's objectives. Adickes v. Kress & Co., 398 U.S. 144, 158-59, 90 S. Ct. 1598, 1609, 26 L. Ed. 2d 142 (1970) .... When a plaintiff alleges a conspiracy to violate civil rights, '[t]he existence or nonexistence of a conspiracy is essentially a factual issue that the jury, not the trial judge, should decide.' Adickes, supra, 398 U.S. at 176, 90 S. Ct. at 1618 (Black J. concurring.)

600 F.2d 600, 621 (7th Cir. 1979); see also Putnam v. Gerloff, 701 F.2d 63, 65 (8th Cir. 1983).

In Hampton, we outlined the elements of civil conspiracy:

> A plaintiff seeking redress need not prove that each participant in a conspiracy knew the 'exact limits of the illegal plan or the identity of all participants therein.' Hoffman-LaRoche, Inc., supra, 447 F.2d at 875. An express agreement among all the conspirators is not a necessary element of a civil conspiracy. The participants in the conspiracy must share the general conspiratorial objective, but they need not know all the details of the plan designed to achieve the objective or possess the same motives for desiring the intended conspiratorial result. To demonstrate the existence of a conspiratorial agreement, it simply must be shown that there was 'a single plan, the essential nature and general scope of which [was] known to each person who is to be held responsible for its consequences.' Id.

600 F.2d at 621. We noted that "[a]bsent the testimony of a co-conspirator, it is unlikely that direct evidence of a conspiratorial agreement will exist." Id.

Applying the standards of Hampton to the present case, this Court believes that sufficient evidence was adduced at trial to merit a conspiracy instruction. Darla Senn prepared and prosecuted NOVs, most of which were meritless. Although the WDHHS became increasingly aware that many of the NOVs which Senn issued were meritless, they pursued them nonetheless. Despite a timely appeal upon notification that Cameo would be placed upon the SOR list, Cameo was placed on the April SOR

list which was forwarded to over 600 social service agencies and departments. Plaintiffs proffered adequate evidence to permit a jury to infer the existence of a conspiracy and to merit a jury instruction thereon.

Our determination that plaintiffs merited a conspiracy instruction does not end our inquiry. "[A]n error in refusing to give an instruction, like any other trial error, is subject to Rule 61, Fed. R. Civ. P. If it 'does not affect the substantial rights of the parties' we are to disregard it." Alloy International Co., 635 F.2d at 1226. Defendants rely upon Beard v. Mitchell, 604 F.2d 485, 497 (7th Cir. 1979) for the proposition that the district court's failure to instruct on plaintiffs' conspiracy theory did not

affect the plaintiffs' substantial rights.

In Beard, this Court held that a court's failure to instruct as requested will not constitute reversible error in three situations: where the requested instruction is given in substance; where a general instruction is given without the specific theory of the case being presented and the party's theory of the case is apparent throughout the course of the trial, and finally, where the requested instruction is unsupported by the evidence adduced at trial.

None of these exceptions apply to the facts presently before this

Court. The requested jury instruction was never given in substance--all the jury instructions and special verdict questions focused on individual liability, not conspiratorial liability. The second exception is likewise inapplicable. Although plaintiffs argued conspiracy during opening and closing arguments, no general instruction on conspiracy was ever provided. Arguments of counsel alone are not a substitute for proper jury instructions. Alloy International Co., 635 F.2d at 1226. Finally, as discussed previously, adequate evidence was adduced at trial to merit a conspiracy instruction.

Defendants' last argument is that the plaintiffs have waived jury instruction errors by failing to object. It is hornbook law that "... [n]o party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection." Fed. R. Civ. P. 51. Although no stenographic transcript is available of the conference at which plaintiffs objected to the court's instructions, plaintiffs filed a statement under Fed. R. App. P. 10 preserving their objections to the district court's failure to give any of the instructions which plaintiff

requested.[8] This statement was served upon opposing counsel and approved

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[8] Federal Rule of Appellate Procedure 10(c) and (d) provides:

> (c) Statement of the Evidence or Proceedings When no Report Was Made or When the Transcript is Unavailable. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the appellee, who may serve objections or propose amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal.

by the district court.[9] We find that this issue has been

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[9] In pertinent part, the statement provides:

> 5. That at that conference a number of the proposed instructions to be given were reviewed but none were agreed to; and the Court indicated it would formulate its own instructions based on instructions presented by the parties.
>
> 6. That at that conference and for the record it was understood that each of the parties were preserving their objections to the Court's failure to give any of the instructions previously offered by that party in the final instructions presented to the jury in this proceeding.

properly preserved for our consideration.[10]

Accordingly, for the reasons stated above, this Court finds that the

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[10] Plaintiffs suggest that the district court improperly restricted the presentation of their conspiracy case. At trial plaintiffs offered into evidence over three hundred exhibits, of which many were several pages long. Plaintiffs contend that the district court refused to allow any testimony about the exhibits other than foundation testimony. As a result of the district court's restrictions on plaintiffs' presentation of their exhibits, plaintiffs conclude that they were unable to fully present their case.

District courts have substantial discretion in controlling the mode and order of presenting evidence. Fed. R. Evid. 611; United States v. Ballard, 535 F.2d 400 (8th Cir.), cert. denied, 429 U.S. 918 (1976); United States v. Daniels, 528 F.2d 705 (6th Cir. 1976). Here plaintiffs had a full opportunity to discuss and explain the exhibits which were presented to the jury during closing arguments. The jury received an index to the exhibits introduced by plaintiffs. Accordingly, we find no abuse of discretion here.

district court erred in failing to instruct the jury on plaintiffs' conspiracy theory. Because the failure to instruct on plaintiffs' theory of the case constitutes reversible error on the facts of this case, we remand this case to the district court for a new trial which shall include instructions on plaintiffs' theory of the case.

II. Whether the district court's jury instructions on due process were erroneous?

It is axiomatic that a fundamental requirement for due process is the opportunity to be heard at a meaningful time and in a meaningful manner. Armstrong v. Monzo, 380 U.S. 545, 552 (1965). "Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity

to be heard are essential." Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971). However, mere injury to reputation, such as being placed on a blacklist, does not, without more, give rise to a cognizable due process claim under the fourteenth amendment. There must additionally be the deprivation of a "liberty" or "property" interest. Paul v. Davis, 424 U.S. 693 (1976). As the Supreme Court noted in Davis, "'[P]osting,' therefore, significantly altered her status as a matter of state law, and it was that alteration of legal status which, combined with the injury resulting from defamation, justified the invocation of procedural safeguards." Id. at 708-709. Here, Cameo properly asserts a cognizable due process claim because Cameo's placement upon the SOR list without the requisite hearing not

only damaged Cameo's reputation but also altered Cameo's legal status. Cameo's placement upon the SOR list, like the individual placed on the list of known drunks in Davis, deprived Cameo of a right under state law: the right to receive referrals from state social service departments and agencies.

Wisconsin law specifically provides that a nursing home is entitled to a hearing prior to placement on the SOR list. Wis. Stat. Ann. § 50.04(4)(d). However, the district court instructions failed to inform the jury that Cameo was entitled to such hearing, but simply provided:

> Due process. To recover on their claim for violation of due process, the plaintiffs, Cameo Convalescent Center, must show by a preponderance of the evidence that a defendant or defendants were personally and directly responsible for placing Cameo on the suspension of referrals list and acted with

> intentional disregard of Cameo's right to appeal this placement. In the alternative, plaintiffs must show that Cameo was denied a timely hearing on the Notices of Violation and the imposition of a plan of correction.

Cameo argues that the district court's instructions on due process were erroneous in two respects: they failed to explain that Cameo was entitled to a hearing prior to its placement on the SOR list, and they failed to inform the jury that the deprivation of Cameo's due process rights could be accomplished by reckless as well as by intentional conduct.

Defendants state that there was no need to inform the jury that Cameo was entitled to a hearing prior to placement on the SOR list because it is undisputed that Cameo did not receive the hearing

to which they were entitled. Defendants argue that the only jury issue was one of legal responsibility, i.e., which, if any, of the defendants was responsible for Cameo's denial of due process.

We think that the jury instructions should have informed the jury that Cameo was entitled to a hearing prior to placement on the list. Although this issue was not disputed, the jury could not determine whether Cameo's due process rights were violated by the defendants unless it was aware that those rights included a hearing prior to placement on the SOR list. On remand, the jury instructions on due process must inform the jury of Cameo's right to a hearing prior to placement on the SOR list.

Cameo also argues that the due process jury instructions failed to inform the jury that Cameo's rights could be violated by reckless as well as by intentional conduct. While the district court's instructions stated that Cameo must prove that the defendants "acted with intentional disregard of Cameo's right to appeal" its placement on the SOR list, the trial judge included a definition of "recklessly" when he instructed the jury on the meaning of intent. Additionally, the special verdict questions inquire whether any of the defendants acted with intentional or reckless disregard of Cameo's rights. Nonetheless, there is a possibility that the jury was confused by the trial judge's "intentional disregard" due process instruction and his subsequent instructions on reckless

conduct. Accordingly, on remand, the trial judge will clearly instruct the jury that plaintiff's due process rights could be violated by intentional as well as by reckless conduct. See Richardson v. City of Indianapolis, 658 F.2d 494, 502 (7th Cir. 1981), cert. denied, 455 U.S. 945 (1982).

III. Whether the district court erred in certain evidentiary rulings and in refusing to give a missing witness instruction?

At trial, Cameo introduced substantial excerpts of deposition testimony of several party-defendants pursuant to Fed. R. Civ. P. 32. Pursuant to Fed. R. Civ. P. 32(a)(4), the defendants read other portions of the deposition introduced by Cameo. Cameo contends that a substantial portion of the deposition testimony

introduced by the defendants was inadmissible as irrelevant, prejudicial or hearsay.

When one party utilizes deposition testimony at trial, "an adverse party may require him to introduce any other part which ought in fairness ... be considered with the part introduced." Fed. R. Civ. P. 32(a)(4). This is the "rule of completeness" which prevents misleading impressions created by taking a statement out of context. 1 Weinstein, Weinstein's Evidence ¶ 106[02] (1982). Such deposition testimony, however, is admissible only in accordance with the rules of evidence. Fed. R. Civ. P. 32(a); Reeg v. Shaughnessy, 570 F.2d 309, 316-17 (10th Cir. 1978).

This Court has carefully reviewed the substantial deposition evidence

introduced by the defendants and finds no reversible error. While, on occasion, evidence which was otherwise inadmissible as irrelevant, prejudicial or hearsay was introduced, such error was harmless in the context of this lengthy jury trial and did not affect the plaintiffs' substantial rights. Inasmuch as this case is being remanded for a new trial, we are confident that the district court will insure on remand that deposition testimony used in accordance with Fed. R. Civ. P. 32(a)(4) is otherwise properly admissible under the Federal Rules of Evidence.

Plaintiffs further argued that the district court abused its discretion by failing to give a missing witness instruction with respect to several party-defendants who did not testify at trial. The determination of whether a

missing witness instruction should be given rests within the trial court's sound discretion. Labit v. Santa Fe Marine Inc., 526 F.2d 961 (9th Cir.), cert. denied, 429 U.S. 827 (1976). Two factors convince this Court that the trial court here did not abuse its discretion in refusing to give a missing witness instruction. First, Cameo relied upon and quoted extensively from the depositions of missing witnesses. As McCormick notes, the justification for the missing witness instruction diminishes with the availability of the tools of discovery. McCormick, McCormick on Evidence § 272 at 657 (2d ed. 1972). Second, and more importantly, plaintiffs commented extensively during closing arguments on the missing witnesses. For these

reasons, this Court finds that the district court did not abuse its discretion in refusing to give a missing witness instruction.

IV. Whether the district court erred in dismissing the claims of the individual plaintiffs?

Prior to the end of the liability phase of the trial, the district court dismissed the claims of the individual plaintiffs, stating that such plaintiffs lacked standing because they had failed to establish any injury from the actions of the defendants. The individual plaintiffs argue that the district court erred in dismissing their claims.

It is clear that under Paul v. Davis, 424 U.S. 693 (1976), the individual plaintiffs do not have a claim against the defendants unless they establish not only that the acts of one

or more of the defendants caused injury to their reputation but also that the individual plaintiffs were deprived of a constitutionally protected interest by alteration of legal status. Mere loss of reputation does not implicate any liberty or property interests sufficient to establish a claim under § 1983.

We agree with the district court that the individual plaintiffs have failed to establish claims cognizable under § 1983. The three exhibits which plaintiffs assert establish injury to their reputation fail to name the individual plaintiffs and cannot be reasonably construed to establish damage to the individual plaintiffs' reputations. Nor do the individual plaintiffs establish any alteration of legal status. They suggest that by virtue of the meritless NOVs, they were

subject to fines, forfeitures or loss of professional licenses under provisions of Wisconsin law. However, no evidence was offered to show that any fines or forfeitures were actually imposed or that any individual plaintiff actually lost his license. Finally, the individual plaintiffs suggest that the plans of correction imposed limitations on how they could pursue their chosen occupations. However, the plans of correction were imposed on Cameo, not the individual plaintiffs. Accordingly, we conclude that the individual plaintiffs were properly dismissed.

Issues Raised by Darla Senn

This Court now addresses the two issues which Darla Senn raises on appeal. The special verdict questions submitted by the district court asked

which of the defendants, if any, had prepared or prosecuted notices of violation against Cameo without probable cause or with malice; whether the notices of violation had been prepared or prosecuted for ulterior or improper motives, and if the defendants were entitled to good faith or prosecutorial immunity. The jury found that only Darla Senn had maliciously prepared and prosecuted notices of violation against Cameo, that she had done so for improper motives and that she was not entitled to good faith or prosecutorial immunity. After the damage phase of the trial was completed, the district court entered judgment against Senn for $75,000. Senn appeals, arguing that the district court erred in entering judgment against her,

and that she was entitled to absolute immunity under Butz v. Economou, 438 U.S. 478 (1978).

I. Whether the district court erred in entering a judgment of liability against Darla Senn based upon the special jury verdict?

Senn contends that the district court erred in entering judgment against her because the issuance of the meritless notices of violation constitutes the common law tort of malicious prosecution, not a claim cognizable under § 1983. Whether abuse of legal process or malicious prosecution rises to the level of a constitutional violation actionable under 42 U.S.C. § 1983 depends upon whether, "acting under color of state law, the defendant has subjected the plaintiff to a deprivation of

constitutional magnitude." Hampton v. Hanrahan, 600 F.2d at 630. However, "conduct which merely engenders common law tort liability, without infringing on constitutionally protected interests, is not a sufficient basis to support a cause of action under Section 1983." Beker Phosphate Corporation v. Muirhead, 581 F.2d 1187, 1189 (5th Cir. 1978). "[T]he common law tort of misuse of legal procedure, without more, does not rise to the level of Constitutional wrong remedied by Section 1983." Id. We conclude that the district court erred in entering judgment against Senn since we find that Senn did not subject Cameo to a deprivation of constitutional magnitude.

Cameo's § 1983 action arises from its placement upon the SOR list without the hearing to which it was entitled.

The nexus between the infringement upon Cameo's constitutionally protected rights and Darla Senn's issuance of the NOVs is simply too attenuated to permit this Court to hold that Senn subjected, or caused Cameo to be subjected, to the deprivation of due process.[11] Between the issuance of the NOVs in September 1978 and Cameo's placement upon the SOR list in April 1979, two further verification visits of Cameo were

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[11] This conclusion is clearly buttressed by the jury's reponse to special verdict question #14:

> Number 14: Which of the following defendants, if any, were personally and directly responsible for the placement of Cameo on the Suspension of Referrals List and acted with intentional or reckless regard of Cameo's right to appeal such placement? Answer: None.

conducted by the WDHHS, meetings were held among WDHHS officials concerning Cameo's notices of violation and most crucially, Cameo's timely appeal to its placement on the SOR list was mishandled, resulting in Cameo's placement on the SOR list. We conclude that although Senn's actions constituted abuse of process and malicious prosecution, they did not subject Cameo, or cause Cameo to be subjected, to its denial of due process, and Cameo may not proceed against Senn under Section 1983.

Having found that Cameo may not pursue its rights against Senn under Section 1983, this Court finds no need to address Senn's second issue: whether she is entitled to absolute immunity under Butz v. Economou, 438 U.S. 478 (1978).

Award of Attorneys' Fees to Plaintiff

One final issue--the calculation of attorneys' fees--remains for our consideration. Pursuant to 42 U.S.C. § 1988, plaintiffs originally sought fees of $144,230.75. After consideration of the guidelines which we set forth in Waters v. Wisconsin Steel Works of International Harvester Co., 502 F.2d 1309 (7th Cir. 1974), cert. denied, 425 U.S. 997 (1976) and plaintiffs' limited success at trial, the district court awarded fees of $44,182. Plaintiffs contend that this award is an abuse of discretion.

It is axiomatic that only prevailing parties are entitled to fees under § 1988. Blum v. Stenson, ___ U.S. ___ (1984); 52 U.S.L.W. 4377 (March 21,

1984); Hensley v. Eckerhart, ____ U.S. ___, 103 S. Ct. 1933 (1983). A party is considered to be a prevailing party if he "succeeds on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Id. at 1939 citing Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978). At this stage of the litigation, it is impossible to term plaintiffs prevailing parties since, at best, all they have achieved is a new trial with proper jury instructions.

Accordingly, we set aside the district court's award of attorneys' fees, subject to reconsideration by the district court if plaintiffs prevail after a new trial. If fees are awarded, the district court shall allow compensation for reasonable law clerk and paralegal fees. Many courts have

recently construed attorneys' fees to include law clerk and paralegal expenses. Laffey v. Northwest Airlines, 572 F. Supp. 354 (D.D.C. 1983); Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983); Richardson v. Byrd, 709 F.2d 1016 (5th Cir. 1983); Berman v. Schweiker, 531 F. Supp. 1149, 1154 (N.D. Ill. 1982); Ross v. Saltmarsh, 521 F. Supp. 753, 769 (S.D.N.Y. 1981). We feel that the better rule is to allow compensation for law clerks as attorneys' fees under § 1988. Such a policy encourages cost-effective delivery of legal services and, by reducing the spiraling cost of civil rights litigation, furthers the policies underlying civil rights statutes.

Conclusion

For the reasons detailed above, we AFFIRM in part, REVERSE and REMAND in part for proceedings consistent with this opinion.

A true Copy:

Teste:

_____
Clerk of the United States
Court of Appeals for the
Seventh Circuit

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

July 30, 1984

Before

Hon. WALTER J. CUMMINGS,
Chief Judge
Hon. HARLINGTON WOOD, JR.,
Circuit Judge
Hon. ROBERT A. GRANT,
Senior Circuit Judge*

(Formal parts omitted)

ORDER

Presently before this court is plaintiff-appellee's Petition for Rehearing and/or in the Alternative for Clarification. The arguments raised in the Petition for Rehearing are the same raised before this Court during

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* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana is sitting by designation.

oral argument and addressed in the briefs of counsel. These arguments have been carefully considered by this Court and resolved in this Court's detailed opinion of June 29, 1984. Counsel for plaintiff-appellee are admonished that petitions for rehearing are not viewed with favor, particularly where they do no more that rehash old arguments.

The opinion in this case which issued on June 29, 1984, is, however, hereby AMENDED as follows:

On page 17, add footnote 12 to the end of the first full paragraph.

On page 17, insert footnote 12 at the base of the page following footnote 11. Footnote 12 reads as follows:

12/ This Court expreses no opinion whatsoever as to whether Darla Senn may be liable under § 1983 for conspiracy to violate civil rights.

IT IS ORDERED that the Petition for Rehearing be, and is hereby DENIED.